IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 23RD MARCH 2007 / 2ND CHAITHRA 1929

SA.No. 527 of 1993()

AS.94/1985 of SUB COURT,KOTTARAKKARA
OS.199/1983 of MUNSIFF COURT, PUNALUR
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APPELLANT:
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1. ABRAHAM CHACKO,
MALLASSERIL HOUSE,
URUKUNNU, EDAMON VILLAGE.

BY ADV. SRI.V.N.ACHUTHA KURUP

RESPONDENTS: PLAINTIFFS & DEFENDANT
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1. D.THANKA
OTTAPLAVILA VEEDU
KALAYAPURAM, MYLOM
KOTTARAKKARA (DIED) LRS IMPLEADED AS ADDL.R6 TO R8

ADDL.RESPONDENTS 6 TO 8

ADDL.R6. MATHAI, OTTAPLAVILA VEEDU, KALAYAPURAM
MYLOM, KOTTARAKKARA.

ADDL.R7. DANIEL, S/O.MATHAI OF DO. DO. DO.

ADDL.R8. LILLY, D/O.THANKA OF DO. DO.

(ADDL.RESPONDENTS 6 TO 8 IMPLEADED AS THE LRS OF
DECEASED 1ST RESPONDENT AS PER ORDER DT. 2/12/03 IN CMP 1333/01)

2. D.ELIZEBATH,
NADUKUNNUVILA VEEDU, OTTAKKAL, BLOCK NO.7
URUKUNNU, EDAMON VILLAGE, PUNALUR.
3. D.MARIA,
NADUKUNNUVILA VEEDU, OTTAKKAL, BLOCK NO.9
URUKUNNU, EDAMON VILLAGE, PUNALUR.
4. D.MARIA,
NADUKUNNUVILA VEEDU, OTTAKKAL, BLOCK NO.7,
URUKUNNU, EDAMON VILLAGE, PUNALUR.
5. PHILIPOSE THOMAS ALIAS PODIYAN,
NADUKUNNUVILA VEEDU, OTTAKKAL, BLOCK NO.7,

URUKUNNU, EDAMON VILLAGE, PUNALUR.

BY ADV. SRI.B.KRISHNA MANI FOR R1 TO R4

" SRI.V.PREMCHAND FOR R6 TO R8

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/ 3 /2007 THE COURT ON 23/03/2007 DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NOS1280/93 & 1599/01 IN S.A.NO.527/1993

23.3.07 DISMISSED SD/- M.Sasidharan Nambiar,
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.527 OF 1993

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Dated this the 23rd day of March, 2007

JUDGMENT

Second appeal is filed challenging the preliminary decree and judgment passed by Sub Court, Kottarakkara in A.S.94/1985 setting aside the decree and judgment passed by Munsiff Court, Punalur in O.S.199/1983. Respondents 1 to 4 are the plaintiffs and 5th respondent the sole defendant in the suit. On the death of first respondent, respondents 6 to 8 were impleaded as her legal heirs in the second appeal. 5th respondent is the brother and respondents 1 to 4 are his sisters. The sisters filed the suit seeking partition of the plaint schedule property contending that the property which admittedly originally belonged to deceased Philipose Pappan, their brother devolved on his sisters and brother namely, respondents 1 to 5 and therefore each of them is entitled to get equal share. Respondents 1 to 4 contended that on

the death of Philipose Pappan his rights devolved on respondents 1 to 5 as provided under Hindu Succession Act as the parties are converted christians. 5th respondent brother resisted the suit contending that deceased Philipose Pappan was a converted christian and parties are governed by Indian Succession Act and therefore respondents 1 to 4 are not entitled to claim any share as they did not inherit any right in the property belonging to deceased brother. Learned Munsiff on the evidence of Pws.1 to 4, Dws. 1 to 3 and Exts.A1 to A9 upholding the case of 5th respondent that parties are governed by Indian Succession Act, as they are christians, dismissed the suit. When that suit was pending, 5th respondent in turn had filed O.S.161/1985 before the same court impleading respondents 1 to 4 as defendants seeking a decree for permanent prohibitory injunction. Case of fifth respondent in that suit was that on the death of Philipose Pappan, his rights devolved on him exclusively and respondents 1 to 4 have no

right over the property and therefore they are to be restrained from trespassing into the property. After the dismissal of O.S.199/1983 the present suit for partition, respondents 1 to 5 settled the dispute in between them and filed a compromise petition before Munsiff Court, Punalur in O.S.161/1985 whereunder respondents 1 to 4 stated that in view of the decree in O.S.199/1983, they admit that fifth respondent brother is the absolute and exclusive owner of the property and they recognised the decree passed by learned Munsiff in O.S.199/1983 and admit that they wrongly raised contentions in that suit and they had withdrawn the contentions and therefore a decree may be passed in terms of the compromise. Accepting the compromise petition filed under Rule 3 of Order XXIII, learned Munsiff passed a decree on 21.8.1985 in terms of the compromise. But subsequent to the said compromise decree in O.S.161/1985, respondents 1 to 4 without disclosing the compromise or the decree or their statement in

the compromise petition that they recognised the decree and admitted the exclusive right of 5th respondent, filed A.S.94/1985 before Sub Court, Kottarakkara. Fifth respondent was also represented by a counsel in the appeal. But before the institution of the appeal, after the compromise decree in O.S.161/1985, 5th respondent assigned the property in favour of the appellants herein as per registered sale deed 3643/85 dated 14.10.1985. In the appeal 5th respondent being the sole respondent in the first appeal, appeared through a counsel. He also did not disclose either the compromise decree or assignment of the property in favour of appellants herein.

2. As seen from the judgment of the first Appellate Court it was contented before the first appellate Court that as parties are governed by Indian Succession Act and in view of the declaration of law by the Apex Court in **Mary Roy v. State of Kerala (1986 KLT 508)** sisters of deceased

Philipose Pappan are also entitled to a share. Learned Sub Judge therefore allowed the appeal and passed a preliminary decree directing division of the plaint schedule property into five equal shares and allotment of four such shares to the plaintiffs. The Second Appeal is filed by the assignees of the 5th respondent after getting permission of this court as per order in C.M.P.1278/93.

3. The Second Appeal was admitted formulating the following substantial questions of law.

1) Are not the plaintiffs guilty of suppressing the compromise entered into between the parties relating to the subject matter of the suit in O.S.161/1985 and in not disclosing the sale deed executed by fifth respondent in favour of appellants in respect of the said property which are valid and binding on respondents 1 to 5?

2) Is not the first appellate Court bound to confine itself to the grounds urged in the memorandum of appeal and was it correct to ignore

the pleading in the memorandum of appeal.

4. Learned counsel appearing for appellants and respondents 1 to 4 were heard.

5. On hearing learned counsel appearing for both sides and on going through the records, it is absolutely clear that both respondents 1 to 4 the appellants in the first appeal and fifth respondent herein and the sole respondent in the first appeal before the Sub Court, played fraud on the first appellate Court. Having entered into a compromise with 5th respondent and filing the compromise petition before the court in respect of the very same subject matter of the suit,unambiguously declaring that respondents 1 to 4 are recognising the decree passed by the trial court in O.S.199/1983 and admitted the exclusive right of 5th respondent over the property, respondents 1 to 4 suppressed these material facts while filing the appeal. If respondents 1 to 4 had stated in the appeal memorandum that compromise was vitiated on any ground and therefore it is not

valid and binding on them and the compromise will not affect their legal right to claim a share or to challenge the decree, it could have been said that there was no fraud played on the court. But when with open eyes, they executed the compromise petition and persuaded the court to pass a compromise decree and thereafter suppressing that fact filed a first appeal and obtained a decree from the first appellate Court, it is clear that they have played fraud on the Court. Similarly 5th respondent, the sole defendant in O.S.199/1983 and the plaintiff in O.S.161/1985, who is a party to the compromise petition and the compromise decree, after obtaining the compromise decree establishing his exclusive right over the property assigned that property to appellants who are third parties to both suits and while defending the first appeal did not disclose this fact before the Court and made the first appellate Court to pass a preliminary decree for dividing the property and allotting 4/5 shares to respondents 1 to 4 who in

fact under the compromise petition agreed that they do not claim any right in the plaint schedule property in view of the preliminary decree. Therefore judgment in A.S.94/1995 which is the result of fraud played on court has to be treated as nonest as declared by the Apex Court in **S.P.Chengalvaraya Naidu v. Jagannath (1994(1) SCC 1.)**

6. But considering the facts and circumstances of the case, I feel that it is in the interest of justice to set aside the judgment of the first appellate Court and remit A.S.94/1985 back to the first appellate Court to decide the appeal afresh after hearing the submissions of the appellants also. The appellants are to be impleaded as respondents 2 and 3 in first appeal. The first Appellate Court has to decide whether respondents 1 to 4 are entitled to claim any right, in view of the compromise decree in O.S.161/1985. Learned Sub Judge has to dispose the appeal afresh after

hearing all the parties in accordance with law. Parties are directed to appear before Sub Court, Kottarakkara on 1.6.07.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.527 /93

JUDGMENT

23rd March, 2007